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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.P. et al., Persons Coming Under the
Juvenile Court Law.

B214681

(Los Angeles County
Super. Ct. No. CK10314)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

G.J.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Randolph Hammock, Juvenile Court Referee, Judge. Reversed and remanded.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Appellant G.J. appeals from the juvenile court's orders granting the Los Angeles County Department of Children and Family Services' petition to terminate her legal guardianship over her grandchildren and denying her Welfare and Institutions Code section 388 petition.¹ For reasons set forth below, we conclude appellant failed to appeal the first order in a timely fashion and the juvenile court erred by summarily denying her section 388 petition.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is the maternal grandmother of twins, J.P. and J.P.1 (born Jan. 1994 and collectively referred to as the twins). J.T. (Mother) and D.P. are the twins' parents.² For reasons not relevant to this appeal, in March 1994, the Los Angeles County Department of Children and Family Services (Department) removed the twins from Mother's custody and placed them with appellant. In 2001, appellant was appointed their legal guardian. In 2005, appellant married L.C.

In February 2008, the Department received a referral regarding a physical altercation between L.C. and Mother. According to the police report, on February 4, during an argument, L.C. took a foot brace from the car and hit Mother in the face, resulting in her receiving 10 stitches and sustaining a fractured jaw. L.C. was arrested and later appellant bailed him out of jail. After learning that L.C. had threatened to kill the twins when they confronted him about the incident with Mother, the Department filed a section 387 petition alleging L.C.'s misconduct and removed the twins and placed them in foster care. The petition was sustained in June 2008.

On September 9, 2008, the Department filed a section 388 petition on behalf of each child, seeking to terminate appellant's legal guardianship. At a hearing held that

¹ All further statutory references are to the Welfare and Institutions Code.

² Mother has a third child, M., who was originally a party to this appeal. On October 13, 2009, we issued an order dismissing the entire appeal. On October 28, 2009, we granted appellant's motion to reinstate the appeal as to the twins.

day, appellant was present with counsel when the juvenile court granted the Department's petitions and ordered that the twins remain in foster care. The court set another placement hearing for March 11, 2009.

In November 2008, L.C. died. On March 11, 2009, appellant filed a section 388 petition asking the juvenile court to reinstate her guardianship over the twins and to place them and M. in her custody. Appellant wrote in her petition, *inter alia*: "My husband is deceased. This is their home and the children want to be with me. I want the judge to restore my guardianship and return the children and place [M.] to my custody as well."

At a hearing held that day, the court stated, "Based upon my review of all the evidence that I just reviewed for today's hearing, but more importantly just based upon the *prima facie* showing in this petition, the court is going to respectively [*sic*] deny your petition. It does not state any new evidence, or a change of circumstances which would require even a hearing in this matter. It also does not state a *prima facie* showing that the request, returning the children to you, or re-establishing their legal guardianship, or what you're proposing in this petition would promote the best interests of any of the children. So it is denied for those reasons without a hearing." When appellant asked to speak, the court replied, "Well, I've denied it without a hearing so unless it's about some safety issues, or something that the court should take aware of about the safety of these children, and there's some danger or there's some problems, I would prefer not." When appellant told him that L.C. was deceased, the court replied, "I read that. Trust me when I say, English is my mother tongue, and you wrote it very clearly, and I understood it when I read it. . . . I believe your heart is in the right place, and I believe your intentions are good. That's not how I judge things. When these petitions are filed I'm required to look at the petition itself, what's being urged in this petition, and what supporting documentation you've demonstrated. And I need to make a determination as to whether or not there's been a *prima facie* showing that there's new evidence, or changed circumstances which would compel the court to even set a hearing, or in the alternative you also need to satisfy that it will be in the best interest of the children to grant that relief. You've not met either one of the prongs. . . ."

DISCUSSION

I. The Appeal From the September 9, 2008 Order

California Rules of Court, rule 5.538(b) provides that after a hearing before a referee, the referee must “(3) Serve the parent and guardian, and counsel for the child, parent, and guardian, a copy of the findings and order, with a written explanation of the right to seek review of the order by a juvenile court judge.” The referee’s order becomes final 10 calendar days after service of the order if an application for a rehearing is not filed and a notice of appeal of the order must be filed within 60 days thereafter. (Cal. Rules of Court, rules 5.540(c) & 5.585(f).)

Appellant did not file a notice of appeal from the September 9, 2008 order terminating her legal guardianship until March 11, 2009. She contends, however, that because she was not served with a copy of the order or provided written notice of her right to seek a rehearing before another bench officer, the September 9 order is not final. The record reflects that while notice of the order was sent to appellant’s attorney, it was not mailed to appellant.

The parties dispute whether the guardian referred to in the rule means a guardian appointed in probate proceedings or one appointed by the juvenile court. We need not reach this issue. Appellant was present and represented by counsel when the court issued the order terminating her guardianship. At one point during the March 2009 proceedings, she questioned whether the June 2008 ruling on the section 387 petition as to L.C. was a sufficient basis to terminate her status as guardian. The referee responded by stating, “The petition was already sustained. If you didn’t like what was sustained, you had a right to appeal it or ask for a rehearing. No one did that.” Implicitly, the court informed appellant of her review rights with respect to its ruling terminating her guardianship, and she does not contend otherwise. At no time has appellant alleged that she failed to request a rehearing or appeal the September 9 order because she was unaware of her ability to do so. We decline to exalt form over substance by finding that the court’s

failure to send written confirmation of rights of which appellant was aware creates a never ending period to timely file an appeal.

Appellant's reliance on *In re Cathina W.* (1998) 68 Cal.App.4th 716 is misplaced. There, the mother attempted to appeal the order setting a section 366.26 hearing. She conceded that she had not complied with section 366.26, subdivision (l)(1), which provides a party may not seek appellate review of a setting order unless he or she filed a timely petition for extraordinary writ review of the order. (§ 366.26, subd. (l)(1)(A).) However, she argued there was good cause to excuse her noncompliance because the juvenile court failed to provide her with the statutory notice that would have advised her of the requirement of filing a writ petition to preserve any right of appeal. (*Id.* at pp. 719-723.)

In finding good cause to allow the mother's appeal, the court relied on two facts not present here. First, the mother did not personally attend the proceeding at which the section 366.26 hearing was set. Second, the mother maintained that because she did not receive the required notice, she "was not 'aware of her right to seek review of the . . . order by way of petition for extraordinary writ or of the consequences to her should she fail to do so.'" (*In re Cathina W.*, *supra*, 68 Cal.App.4th at p. 723.) In our case, appellant was present with counsel at the September 9 hearing and has not alleged she was unaware of her right to seek a rehearing or a review of the order issued by the referee.

Moreover, the record strongly suggests appellant was keenly aware of her appellate rights and simply chose not to exercise them while L.C. was alive. When the juvenile court denied her section 388 petition, she filed the operative notice of appeal the same day.

We conclude appellant failed to timely appeal the September 9 order terminating her legal guardianship.

II. The March 11 Order

Appellant contends she made a prima facie showing sufficient to warrant a hearing on her petition. The Department argues appellant failed to show a substantial change of circumstances or that it was in the best interest of the twins to reinstate appellant as their guardian.

Section 388, subdivision (a) provides that “Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.” Subdivision (d) states, “If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given”

In *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, the court summarized the factors to be considered in ruling on a section 388 petition: “(1) the seriousness of the problem which led to the [order], and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. While this list is not meant to be exhaustive, it does provide a reasoned and principled basis on which to evaluate a section 388 motion.”

“In order to avoid summary denial, the petitioner must make a ‘prima facie’ showing of ‘facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ [Citations.] ‘[I]f the petition fails to state a change of circumstances or new evidence that might require a change of order, the court may deny the application ex parte. [Citation.]’ [Citation.] On the other hand, ‘if the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.’ [Citation.]” (*In re Lesly G.* (2008) 162

Cal.App.4th 904, 912, fn. omitted.) We review the denial of a section 388 petition for abuse of discretion. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

There is little doubt appellant demonstrated that the “problem” which led to the court’s order was ameliorated. Her seven-year guardianship of the twins was terminated because of the altercation between L.C. and Mother and the ensuing threat L.C. made to the twins. Even if we accept the Department’s premise that appellant caused the rift between her and the children by siding with L.C. over them, the fact of the matter is L.C. was the primary source of the problem, not appellant. The alleged imminent threat to the twins’ health and well-being was extinguished when L.C. died.

The relevant question is, did appellant provide a sufficient showing that the twins would benefit from a change of the prior order? Although the petition did not set out in detail the circumstances in favor of restoring appellant’s legal guardian status, the court was well aware of appellant’s history with the twins. Appellant had provided them with a stable home for over 14 years after they were removed from Mother’s custody at the age of three months. No one questions the family bond is substantial. It is difficult to equate that bond with one the twins may have developed during the single year they lived with their foster mother. In addition, appellant alleged the twins want to return to her home. Finally, there is little question that appellant’s reinstatement as the twins’ guardian would provide them more stability than placement in a foster home. At a minimum, appellant presented ““facts which will sustain a favorable decision if the evidence submitted in support of the allegations by [her] is credited.”” (*In re Lesly G., supra*, 162 Cal.App.4th at p. 912.) As such, she submitted enough to avoid a summary denial of her petition.

DISPOSITION

The March 11, 2009 order summarily denying appellant's section 388 petition is reversed. The matter is remanded to the juvenile court with directions to conduct a hearing on the merits of appellant's petition.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.